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Supreme Court of the United States

October Term, 1971

No. 72-171

LAWRENCE STEWARD,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Commonwealth of Virginia, respectfully submits the following brief in opposition to the granting of a writ of certiorari in the above matter. The parties will be referred herein by their respective positions in the trial court, i.e., defendant and Commonwealth.

QUESTIONS PRESENTED

The Commonwealth will restate the questions presented in order to remove from them statements of arguable facts:

1. Did the Commonwealth suppress evidence favorable

to the defendant so as to deny the defendant due process of law?

2. Was the evidence sufficient to support the verdict and judgment of the trial court?

3. Was improper and prejudicial evidence presented to the trial court during sentencing proceedings in violation of defendant's due process rights?

STATEMENT OF THE CASE

The "Statement of the Case" set out in defendant's brief is substantially correct. However, the Commonwealth will briefly review and highlight the pertinent facts in order to more accurately present the facts as they appeared before the trial court.

Defendant was indicted for the murder of Warren Thomas Woodward, a sailor stationed in Norfolk, Virginia. The assault, which resulted in the death of Woodward, took place on the sidewalk of Hampton Boulevard in Norfolk in the evening hours of September 28, 1970. Death was caused by a blow or blows to the head.

An eyewitness to the incident, Mrs. Cathon, testified that she was driving on Hampton Boulevard when she observed a sailor being beaten by two men. He was being kicked in the back and head, and his head was "being stomped on." (Tr., p. 34). She stopped her car, got out, and walked towards the sailor, when the defendant turned around and looked at her. He then alerted his co-defendant that she was coming, and they ran off. (Tr., p. 35).

Mrs. Cathon positively identified the defendant as one of the ones doing the beating. (Tr., pp. 33, 35, 38, 39, 40). She also stated that both of the persons were doing the beating simultaneously. (Tr., p. 37). Defendant attempts to dispute this positive identification with the statement that

his identification was somewhat qualified on cross-examination. A close reading of Mrs. Cathon's cross-examination shows that her identification was not positive as to the co-defendant, Brooks, but was positive as to the defendant. (Tr., pp. 45-49).

The second key witness for the Commonwealth was a Mrs. Bonney who lived near the scene and who was an acquaintance of the defendant. She testified that on the day in question, the defendant and Brooks were staying at her house where she lived with another woman. They were visiting in Norfolk from their home in New York.

On the night of the assault, the defendant and Brooks returned to the house after having been out all day. In a resulting conversation between the four of them, the two men were describing between themselves how they had beat some white man. (Tr., p. 71). They said that they had just killed some "Honky," and both of them indicated that they thought they had some of his brains on their shoes. They indicated that they had beaten him because he was white. The defendant and Brooks are black. They said they had beaten this white sailor on Hampton Boulevard, and that they had stomped him and kicked him and beat him. (Tr., p. 72).

Defendant describes this witness as a "young girl"; however, young woman would be more accurate. Although she never testified as to her age, she had four children. Further, her testimony was very straightforward and unequivocal and was not shaken on cross-examination. She also described Brooks as wild-eyed, but not Steward, and did not testify that they were drunk.

Any further discussion of facts, as they specifically relate to the questions raised by the defendant, will be set out in the Law and Argument to follow.

LAW AND ARGUMENT

1.

Did The Commonwealth Suppress Evidence Favorable To The Defendant So As To Deny The Defendant Due Process Of Law?

There were two young girls, Cynthia and Glenda Vines, who were eyewitnesses to the crime, but who were not called by the Commonwealth. On cross-examination of one of the investigating police officers, it was brought out that these girls had been shown photographs of the defendant and Brooks and had identified Brooks, but not the defendant. Defendant claims that this was a suppression of evidence favorable to the defendant and deprived him of his Constitutional rights to due process.

Initially, it should be pointed out that the evidence was not "suppressed" since it came out at trial and was before the trial court. Secondly, the evidence was not a "secret" withheld by the police or the prosecutor, because it had become public record at the trial of the co-defendant, Brooks, which was held on January 15, 1971, three months prior to defendant's trial.

The Commonwealth will include as an appendix to this brief excerpts from the transcript of the trial of Brooks which fully explore the showing of the pictures to the girls and the extent of their identification. The fact of the identifications made by these girls, and that they had been witnesses, was fully explored in Brooks' trial, and therefore was a matter of public record. Although the Commonwealth has no way of knowing whether defendant's counsel attended the trial of Brooks, it seems inconceivable that he would not, considering that Brooks was a co-defendant. Certainly the defendant cannot complain of any "surprise" under these circumstances.

Finally, the Commonwealth submits that the evidence that

was allegedly "suppressed" was not such as to materially affect the outcome of the trial if it had been known to the defendant sooner. Certainly, its actual effect on the trial was negligible, since the fact that the girls had not identified the defendant was before the Court, and did not detract from the otherwise overwhelming evidence of guilt of the defendant.

Certainly the leading case relating to suppression of evidence is *Brady* v. *Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), a case which has been followed, construed, and distinguished by numerous lower court decisions. Under the *Brady* rule, there must be a failure of the prosecution to disclose exculpatory information at the trial, not necessarily prior thereto. It does not require pre-trial discovery. *United States* v. *Cole*, 453 F.2d 902 (8th Cir. 1972); *United States* v. *Cole*, 449 F.2d 194 (8th Cir. 1971); *United States* v. *Trainer*, 423 F.2d 263 (1st Cir. 1970). Further, the evidence suppressed must be exculpatory or materially aid the defense. *United States* v. *Randolph*, 456 F.2d 132 (3rd Cir. 1972); *United States* v. *Hill*, 455 F.2d 504 (9th Cir. 1972); *Clarke* v. *Burke*, 440 F.2d 853 (7th Cir. 1971); *Giglio* v. *United States*, ... U.S. ....., 31 L.Ed.2d 104, 92 S.Ct. ..... (1972). As stated in *Giglio*, *supra*, "we do not, however, automatically require a new trial whenever the combing of the prosecutor's files after trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict."

In the instant case, not only was there in fact no "suppression" of any evidence, but the evidence in question would not have been material to the defendant's case, since the record of the trial of the co-defendant Brooks show that the girls did not identify the defendant because they were never in a position to see his face. Certainly there has been no showing of a denial of due process of law.

2.

Was The Evidence Sufficient To Support The Verdict And Judgment Of The Trial Court?

This assignment of error by the defendant is essentially a simple question of sufficiency of the evidence, which is not a Federal constitutional question and therefore not a proper ground for granting certiorari. *Thayer* v. *Spratt*, 189 U.S. 346, 47 L.Ed. 845, 23 S.Ct. 576 (1903); *Grayson* v. *Harris*, 267 U.S. 352, 69 L.Ed. 652, 45 S.Ct. 317 (1925).

Defendant has attempted to convert this into a Federal question by asserting that the conviction is devoid of evidentiary support. However, the facts simply do not justify such an argument. There was ample evidence that a murder had been committed and that the defendant had jointly participated in it and was responsible for it.

3.

Was Improper And Prejudicial Evidence Presented To The Trial Court During Sentencing Proceedings In Violation Of Defendant's Due Process Rights?

The Commonwealth would bring to the attention of the Court initially that defendant's brief contains some misleading, if not inaccurate assertions. First, the defendant asserts that "emotional, inflammatory letters were read into the record" at the sentencing hearing. The letters in question were written to the Commonwealth's Attorney (prosecutor) by the father of the victim, and attempted to describe the type of person the victim was and what he was doing when he was killed. There was nothing therein relating to the defendant, per se, and certainly nothing extremely "emotional" and "inflammatory." Furthermore, this same matter had already been testified to by the victim's father during the actual trial, and was already properly in

the record. It was hearsay at the time of the presentation of the pre-sentence report only because it was obtained by the probation officer from the letters rather than from the trial transcript.

Secondly, defendant asserts that he was prejudiced by the fact that the probation officer reported that the co-defendant Brooks had claimed that he was under the influence of drugs at the time of the assault. While this was an opinion or conclusion of the probation officer, the basis for that conclusion was fully set out so that the sentencing judge could evaluate that information and form his own conclusions. Further, this information was also a part of the record in the trial of the co-defendant Brooks.

The procedure followed by the trial court for sentencing was in conformity with § 53-278.1, Code of Virginia (1950), which reads as follows:

> "§ 53-278.1. Investigation by probation officers in certain cases.—When a person is tried upon a felony charge for which a sentence of death or confinement for a period of over ten years may be imposed and pleads guilty, or upon a plea of not guilty is tried by the court without a jury as provided by law, and is adjudged guilty of such charge, the court may, or on the motion of the defendant shall, before fixing punishment or imposing sentence direct a probation officer of such court to thoroughly investigate and report upon the history of the accused and any and all other relevant facts, to the end that the court may be fully advised as to the appropriate and just sentence to be imposed. The probation officer shall present his report in open court in the presence of the accused who shall be advised of the contents of the same and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter which he may desire to present. The report of the investigating officer shall be filed as a part of the record in the case."

This procedure is proper, and the introduction of additional evidence to that which was presented at the trial is not a violation of due process. *McClain* v. *Commonwealth*, 189 Va. 847, 55 S.E.2d 49 (1949); *Linton* v. *Commonwealth*, 192 Va. 437, 65 S.E.2d 534 (1951).

It has been consistently held by this Court and lower Federal courts that such a sentencing procedure is not unconstitutional and is not subject to the same due process requirements as the trial itself. *Williams* v. *New York*, 337 U.S. 241, 93 L.Ed. 1337, 69 S.Ct. 1079 (1949), reh. den. 337 U.S. 961, 93 L.Ed. 1760, 69 S.Ct. 1529, 338 U.S. 841, 94 L.Ed. 514, 70 S.Ct. 34; *Williams* v. *Oklahoma*, 358 U.S. 576, 3 L.Ed.2d 516, 79 S.Ct. 421 (1959), reh. den. 359 U.S. 956, 3 L.Ed.2d 763, 79 S.Ct. 737; *Taylor* v. *United States*, 179 F.2d 640, cert. den. 339 U.S. 988, 94 L.Ed. 1389, 70 S.Ct. 1010 (9th Cir. 1950); *Klingstein* v. *United States*, 217 F.2d 711 (4th Cir. 1954); *United States* v. *Chewning*, 458 F.2d 381 (9th Cir. 1972). The type of evidence and information before the trial court in the instant case, to which the defendant objects, was specifically approved in *Williams* v. *New York*, *supra*, as stated in *Williams* v. *Oklahoma*, *supra*:

> "This Court . . . held that, once the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and to the convicted person's life and characteristics."

Defendant's reliance on *United States* v. *Weston*, 448 F.2d 626 (9th Cir. 1971) is misplaced, not ony because

Weston is a somewhat singular exception to the line of cases stemming from *Williams* v. *New York, supra,* but also because there is no close factual comparison between *Weston* and the instant case. In *Weston,* the evidence introduced at trial warranted the minimum punishment of five years, and the trial judge so stated. However, a pre-sentence investigation and report was made. The report, which was introduced at the sentencing hearing, contained unsworn evidence detailing otherwise unverified statements to an unknown informer to the effect that the defendant is probably guilty of additional and far more serious crimes. The trial judge, admittedly taking this information into consideration, then sentenced Mrs. Weston to fifteen years.

None of the information in question in the instant case involved other crimes, and there is no evidence whatsoever that the trial court judge based his sentence upon the objected to evidence. The record in the instant case, contrary to the inferences in defendant's brief, does not show prejudice against the defendant on the part of the probation officer. The pre-sentence report contained information favorable to the defendant, as well as unfavorable. It did not contain "highly prejudicial" and "inflammatory" remarks, as asserted by defendant, without support. Defendant has not even shown that any of the information was untrue. The sentence received by the defendant was justified under the facts of the case and was not a result of any prejudice by the judge or anyone else.

CONCLUSION

For the reasons set forth herein, it is submitted that no error, constitutional or otherwise, was committed by the trial court or the Virginia Supreme Court, and the petition for writ of certiorari should be denied.

Respectfully submitted,

ANDREW P. MILLER
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Supreme Court Building
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CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari in the case of Lawrence Steward v. Commonwealth of Virginia, were this 10th day of November, 1972, mailed to Stanley E. Sacks, Esquire, Sacks, Sacks & Tavss, 405 First & Merchants National Bank Building, Norfolk, Virginia 23510.

GILBERT W. HAITH
Assistant Attorney General

Cross-Examination

* * *

[20]

Mr. McLellon:

Q Taking these pictures here, this is the only connection you had with this case, is that correct? A There and at the Medical Examiner's Office, yes, sir.

Q You didn't go out and interview any witnesses? A Yes, sir, I did.

Q Who did you interview? A I interviewed Cynthia Vines, along with Detective Everett.

Q Who else? A Glenda Vines.

Q Who else did you interview? A Just those two.

Q The only connection with the case were these pictures and interviewing Cynthia and Glenda Vines? A Yes, sir.

[21] Q Where did you interview them? A Their home at 1010 West 42nd Street.

Q 42nd Street? A Yes, sir.

Q Don't they live on 26th Street? A They lived on 42nd Street at that time.

Q Did you show them any photographs? A Yes, I did.

Q Did you show them any of the defendant, here? A Yes, sir.

Q How many others? A I believe there was a half dozen in all, but I don't have the envelope.

Q Are these girls here today? A Far as I know, yes, sir.

Mr. Campbell: They are here.

(Mr. Dills presented envelope to the witness.)

Mr. McLellon:

Q What is their race? A I showed them eight photographs.

Q What is the race of Glenda and Cynthia Vines? A They are Negro.

Mr. McLellon: That is all I have, your Honor please.

* * *

[22] By Mr. Dills:

Q I have just a few questions, Detective McManus.

(Mr. Dills presented envelope to Mr. McLellon.)

Mr. Dills: Your Honor, we ask that this package of eight pictures, we just ask it be marked Commonwealth's Exhibit C8.

Mr. McLellon: You are just marking, not putting them in?

Mr. Dills: This is for the purpose of identification, at this point.

(Envelope marked by the Court.)

Mr. Dills:

Q Detective, I show you C8 and ask if you can identify that? A These are the photographs that Detective Everett and myself showed to Glenda and Cynthia Vines.

Q Is that at 1010 42nd Street? A No, sir. I showed them to them on 27th Street. I don't know the number offhand, but it was on West 27th Street at another home.

Q How many pictures appear there? How many pictures are there? A Eight photographs.

Q Are these the eight you showed the two girls at that time? [23] A That is correct.

Q All right, sir.

Mr. Dills: I'm going to offer them in evidence at this time.

* * *

By Mr. McLellon:

Q You did not show these girls any pictures of a man by the name of Steward, did you? A I believe he was included in there.

Q Were these girls supposed to have been at the scene? A They were in the Drive-In restaurant. It's a hamburger place, directly across the street from where the offense allegedly occurred.

Q You were asking the girls if they could identify any of the men in connection with the alleged killing, is that right? A That's correct.

Q When did the killing occur? What was the date of it? A It was on the 28th of September.

Q I notice these pictures that you have here of both Steward and Brooks have the date of the alleged killing on there, don't they? A I'm not certain.

[24] Q You are not certain? A I'm not certain of the date on there.

Q These pictures of these various men, one says August 17th of 1968. A I'm not certain of the dates the photographs were taken.

Q Still, you have an alleged crime committed and you have a date on a picture. Don't you think that is of a little significance?

Mr. Dills: I have simply offered them in evidence. I don't know I have turned the witness over to Mr. McLellon. If there is any objection, I would like to know.

Mr. McLellon: We want to—

Mr. Dills: Is there an objection?

Mr. McLellon: Are you offering them at this time?

Mr. Dills: That's right.

Mr. McLellon: Do you have further examination of him?

Mr. Dills: I don't have to answer that.

Mr. McLellon: Concerning the offering in evidence. I think I can go into the photographs. Whether or not they would be of benefit to the Court.

The Court: Have you completed your examination?

[25] Mr. Dills: Yes, sir.

The Court: You can go ahead and examine.

Mr. McLellon: Your Honor, please, I might say this picture here has some notations on the back right here, which I think would make it inadmissible.

Mr. Dills: Is Mr. McLellon testifying, Judge, or is he going to let the witness answer the question?

Mr. McLellon: I'm pointing something out to the Court.

Mr. Dills: You'll have to be a witness, Mr. McLellon.

The Court: You can examine the witness.

Mr. McLellon:

Q I believe from your notation, you showed these to these girls on October 7th, is that correct? A Yes, if that is what is written on the back of that photograph, that is correct.

Mr. McLellon: Your Honor, I would object to these pictures being admitted in evidence. I think especially the photograph of Brooks, here, which has some notations on the back, and I think it would be inadmissible. I don't think it should be gotten in before any jury and I don't think it [26] should be gotten in before your Honor. I think also, your Honor, the dates on these photographs here of both Steward and Brooks, that it would be suggestive to a person to make an identification. Anybody who can read, can see the dates on it.

Mr. Campbell: Mr. McLellon brought out from the witness that he did show these girls some pictures. We are offering these only to follow up, to show what he did show to them. We are not offering them for anything written on them, but to show what the girls saw.

Mr. McLellon: We object.

The Court: Of course, I don't know what is on the pictures. It was mentioned there were dates on there and certain notations on the back. I don't know what the notations are and should not go into them at this time. Your position is there are notations on the back and they would make them prejudicial?

Mr. McLellon: For one thing, they put him on the stand to identify some pictures and they say that is all. Now, they want to go ahead and put other photographs in evidence and I think the Commonwealth would have realized the notations [27] are prejudicial to the defendant and that is why they didn't put them in in the first place. Concerning the dates, I think it's suggestive to anyone to make identification.

Mr. Dills: There is no evidence they saw the dates, but I'll clear that up.

Mr. McLellon: If they looked at the pictures, they wouldn't have seen the dates?

Mr. Dills: If I could inquire of him, we can clear it up.

The Court: You can ask him.

* * *

By Mr. Dills:

Q I show you these eight pictures and ask you how you showed them to the two girls. A I handed her this stack of photographs and at that time, there were no notations on the back.

Q At that point, that day? A That's right.

Mr. McLellon: No names on them?

A Names, yes. Notations were made after she made identification of the photographs. I selected the photographs because they came as close to the defendants as I possibly could make them.

Mr. Dills:

[28] Q Did you see them, did they look at the back of the pictures? A No, sir. They looked through them like this, and she did not hesitate when she came to the defendant's photograph.

Mr. Dills: All right.

* * *

By Mr. McLellon:

Q You say the names of the people were written on the back, is that correct? A Yes, sir.

Q And these little girls, I guess they go to school, don't they? A Yes, sir. They did not turn the photographs over.

Q You are testifying they did not turn the photographs over? A That's correct. I stood there and handed them to them. They looked at the face of the photograph and that is all.

Q To clarify this, this crime had been in the newspapers around here? A Yes, sir.

Q Also the names of the people charged had been in the newspaper? [29] A I imagine so.

Q You imagine so? Didn't you read it yourself, personally? A I don't recall the names were in the newspaper. I imagine they were, sir.

Q Didn't you read the articles on this? A I probably did.

Q You say you don't remember whether the names were in the articles? A That's correct.

Q Did you tell them after they had looked at these pictures, that they had made a correct identification? A Yes, sir. I did.

Mr. McLellon: All right, Judge. That is all I have of him. I still object to these pictures being put in evidence.

Mr. Campbell: Your Honor, maybe we can solve this thing.

Mr. McLellon: I would object to Mr. Campbell taking over the examination.

Mr. Campbell: I'm not taking over the examination of any witness. I'm conferring with the Court and making objections. I think I have a right to. I'm not examining any witness Mr. Dills has.

[30] Mr. McLellon: Are you objecting to the pictures?

Mr. Campbell: I'll address my comments to the Court. There is only one picture with notations on the back other than the name. We will be glad to eliminate the notations and that will leave the face of the photograph with names on the back. Some of them don't have names on the back. We will offer them without notations other than names on the back.

The Court: I'm going to accept the evidence of the pictures. I don't see that is overly suggestive. It is testified they did not see the back of the pictures and the back is going to be blotted out. I'm going to admit it in evidence.

Mr. McLellon: We object, of course, and feel the dates on there, that this is highly suggestive and we object. Please note our exception.

Mr. Dills: That is all I have.

* * *

Testimony of Glenda Vines

[72] * * *

(Glenda Vines called to the witness stand by Mr. Campbell.)

* * *

Glenda Vines, Witness called by the Commonwealth, having been first duly sworn, was examined and testified as follows:

* * *

By Mr. Campbell:

Q What is your name? A Glenda Vines.

Q I'm going to ask you to speak up loud and clear. How old are you? A 15.

Q Where do you live? A 320 West 26th Street.

Q Where were you living on September 28th of last year? A 1010 West 42nd Street.

Q 1010 42nd Street? [73] A Yes, sir.

Q How far is that from Rich's hamburger place on the corner of 42nd and Hampton? A About a block, I would say.

Q Is it in the same block that Rich's is located? A Yes, sir.

Q Who were you living there with? A My mother.

Q Who else? A My brother.

Q How old is your brother? A 11.

Q How old is your sister? A 14.

Q What is her name? A Cynthia.

Q Do you remember what day of the week September 28th was? A No, sir. I know it was on a Monday.

Q On a Monday? A Yes, sir.

Q That Monday night, did you have occasion to go to Rich's hamburger place? A Yes, sir. I was going there to buy something [74] to eat.

Q Speak up. A I was going to buy something for to eat.

Q Who went with you? A My sister.

Q Cynthia? A Yes, sir.

Q About what time did you go? A Around 8:00.

Q At night? A Yes, sir.

Q While you were at Rich's, did you see anything happen on the other corner, across from Rich's? Anything unusual happen? A Across the street from Rich's?

Q Yes, in that area. A I saw two people, two men over there, and one sailor.

Q I can't hear you. A I saw one sailor and two men.

Q When you saw them, where were they? When the sailor and the two men were together, where were they? A On the side of BeLo, you know.

Q The side of the Street BeLo is on? A Uh huh.

[75] Q Now, what were they doing? A First they hit him and then they started kicking him.

Q Who is the "they" you are talking about? Was the sailor white or Negro? A He was white.

Q Were the men—the other two men—white or Negro? A Negro.

Q We can identify them that way. Were the other two men sailors or not? A They weren't sailors.

Q The white man had on a sailor uniform? A Yes, sir.

Q Who was beating who? A Both of them was beating him up.

Q Beating who up? A The sailor.

Q How were they going about it? Explain it the best you can. A They were kicking him in the head.

Q Was the sailor standing up or down on the sidewalk? A He was on the ground.

Q Which one of the men was kicking? [76] A Both of them.

Q What part of the sailor's body were they kicking? A The head.

Q Did you see the sailor at any time when he was standing up? A No, sir. I hadn't turned around then.

Q Now, the two men that were kicking him, when was the first time you saw either one of them that night? A I haven't never seen them before.

Q That night, when was the first time you saw them? A They came up to Rich's window and looked in.

Q Came up and looked in Rich's window? A Yes, sir.

Q What sort of place is Rich's? How many windows does it have? A It got one big picture window you can open and one side door, two side doors.

Q Were the doors open or closed? A They were closed, you know. The front door was closed.

Q Was the window open or closed? A They were closed.

Q How long before you saw the two men and the [77] sailor together did you see the two men run over at Rich's? A The sailor got—no—the two men got off the bus.

Q The two men? The two colored men? A Yes, sir.

Q They got off the bus? A Yes, sir.

Q Where did they go? A They came across the street.

Q They got off on the other side of Hampton Boulevard

from Rich's and came across the street to Rich's A Yes, sir.

Q Did they come inside? A Uh uh.

Q How far were you from them when they were at Rich's? A I was close up to the window and they came up close.

Q Then what did they do? A They just looked in. One looked in.

Q Can you identify the person in this courtroom who looked in?

Mr. McLellon: I think we are going to have a question as to this identity now, and I would object to any type question as to identification. [78] Your Honor heard the police officer say he went to see this girl, and after showing the pictures he told her it was a correct identification. This influences this girl and I object to any type identification being made.

The Court: The test is going to be on what does she base her identification today.

Mr. McLellon: Of course, it's something at this time. The fact of a police officer, a detective, telling a—what is she about a 14 or 15 year old girl—that this is a correct identification, that these are the men that did it. This cannot help but influence a person and for that reason, I would object to any type identification being made by this girl.

The Court: As I said, I'm going to let him question her and I'm going to let you question her and the test is going to be whether her identification has been so tainted that her identification cannot be entered in evidence.

Mr. McLellon: I know, as your Honor knows, there are many things we know are wrong that are legally not wrong

and people are influenced by certain things. Take jurors, you hear the stories about things they tell you later they thought was [79] important and wasn't important. We know many things influence a person that they would never admit influenced them. With the fact the police officer previously told the girl her identification was correct, this would taint it and I can't possibly see any way that it could help but be tainted.

The Court: I'm going to see what the evidence presents. All right.

Mr. Campbell:

Q Can you identify the person that looked in, in this courtroom today? A Yes, sir.

Q Would you point to that person, if you can? A (Witness pointed to the defendant)

Mr. Campbell: The record will show she is pointing at the defendant.

Mr. McLellon: Note our exception to it.

The Court: Yes, sir.

Mr. Campbell:

Q What type clothing was the defendant—the one who looked in—wearing? A Fur coat.

Q After he looked in, where did he go? A They went back down that way by BeLo's way, [80] by the bus stop.

Q Who was at the bus stop? A The sailor was coming, you know, from BeLo way, up to the bus stop.

Q Coming from the direction of BeLo's? A Yes, sir.

Q Where did the three of them meet? A Out there in front of the whiskey store.

Q What was the first thing that was done? A First I know, they were hitting him and he fell on the ground.

Q Did you hear anybody say anything? A No, sir.

Q Any of the three of them? A No, sir.

Q Which one hit first? A I don't know, but I know both of them hit him.

Q Both of them hit who? A Hit the sailor.

Q What did the sailor do? A He fell on the ground.

Q Did the sailor ever hit them? A No, sir.

Q Did you see him try to hit them? A No, sir.

[81] Q After he fell on the ground, did he ever get up? A He tried to. He tried to get up and get his hat.

Q What happened? A They knocked him back down and started kicking him.

Q Which one was kicking? A The one in the fur coat.

Q What kind of coat did the other one have on? A A leather coat.

Q What did the one in the leather coat do? A He was just standing up there and then they started running across the street when the man came out of Rich's.

Q What man came out of where? A Rich's.

Q What did that man do? A He came over and looked at the man.

Q Where was the man from Rich's when the two men ran? A He was inside.

Q Then what did he do? A Then he went back in

and called the police and the other man came up and that's when the lady pulled over [82] in the car.

Q The lady pulled up in tht car? A Yes.

Q A white lady or a Negro lady? A White lady, with children.

Q Did you see her here? A Yes.

Q When the two men ran from where the sailor was, where did they go? A They ran across the street and went on 40th Street.

Q On 40th Street? A Yes, sir.

Q Does that mean they had to go down Hampton Boulevard a little ways? A No, sir.

Q You were at 42nd Street, weren't you? A Uh huh.

Q How did they get to 40th Street? A Because the next corner when they got across the street is 40th Street, because a church— Q They ran to the next corner and got on 40th Street? A Yes, sir.

Q Did you keep them in sight or did you lose [83] sight of them? A Then they came back.

Q Did you ever lose sight of them? A No, sir.

Q Where did they go on 40th Street? A They went on 40th Street. I didn't see them when they went on 40th Street.

Q That's why I asked did you lose sight of them. Did you understand what I meant? A I lost sight of them.

Q How long before you saw them again, was it, approximately? A Until the police came.

Q No. How long was it until you saw them again? Can

you tell us in minutes, about? A It was a minute when they came back.

Q Where did you see them come from? A They were coming from 40th Street.

Q Where did they go? A 42nd, down the other end.

Q How did they get from 40th Street to 42nd? A They were walking.

Q On what street were they walking? A They were walking on the sidewalk, the other side of Hampton Boulevard.

[84] Q You saw them walking from 40th to 42nd Street? A Yes.

Q What were they doing? A They won't doing nothing. They was just walking together.

Q When they got to 42nd Street, what happened? A I didn't see them then, because it was real dark on 42nd Street.

Q Where were they the last time you saw them? The last time that night you saw them?. A They were going back down 42nd Street. I didn't see them no more then.

Q Were they walking or how?

Mr. McLellon: Your Honor please, she already said they were walking.

A They were walking.

Q How far did they get from Hampton Boulevard before you lost sight of them on 42nd Street? A They were running across Hampton Boulevard.

Q Pardon? A They ran across Hampton Boulevard, got on the other side and went on 40th Street.

Q After they left 40th Street, what did they do? A They was on the other side of Hampton Boulevard and were walking about, going down 42nd.

[85] Q Tell what else happened? A I ain't seen them because it was real dark on 42nd Street. They got way down.

Q Did you see them any more that night? A No, sir.

Q You say you identify this man as being the one in the fur coat? Were you ever able to identify the other man? A No, sir.

Q Did the police come to you and talk to you about this? A No, sir, but two detectives came to our house.

Q Do you know how long after that night they came to your house? A They came the next day.

Q Were you shown any pictures? A Yes, sir.

Q Do you know how many pictures you were shown? A I think around eight of them.

Q Were they all Negroes or some white and some Negro, or what? A They were all Negro.

Q How many of those pictured did you identify as being one of the men there? A Just one.

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Cross-Examination

[90] * * *

Q Did the police officer show you that picture? A Yes, sir.

Q He didn't ask you whether he was one of the men got off the bus that was there? A No, sir.

Q Did he ask you if you could identify the men? A Yes.

Q You didn't pick that man out, did you? A Yes, sir.

Q You picked that man out? A Uh huh.

Q You told the officer that man is one of the men that got off the bus at Rich's? [91] A Yes, sir.

Q You told the police officer that? A Yes, sir.

Q Which police officer did you talk to? A I didn't talk to a police officer. It was two detectives.

Q Were both of them with you at the same time? A Yes, sir.

Q They stuck right with you? A Yes, sir.

Q Each of them heard everything you said, is that right? A Yes, sir.

Mr. McLellon: Do you have Detective McManus on call? I think he is the one testified he went by to see the girl.

Mr. Campbell: Uh huh.

Mr. McLellon: We would like him produced, your Honor. If he is on duty, he could be told to come back over so we could clarify this.

Mr. McLellon:

Q Now, let me ask you, was your sister, Cynthia, there at the same time they showed you these pictures? A Yes, sir. They showed us together.

Q Did your sister, Cynthia, tell the police [92] officer this man was the one at Rich's? A Yes, sir.

Q She told the police officers that also? A We ain't talked to no police officer.

Q I mean the detectives. A Yes, sir.

Mr. McLellon: Judge, I would like the record to show that the—

Q This is the photo I showed you right here, correct? A Yes, sir.

Mr. McLellon: Judge, this is the one with 62003. I believe the men shown on the photographs have different numbers in the little plates and I think 62003 is the one we are talking about.

Q Let's get this straight. You told the police officer this was one of the men? A Yes, sir.

Q Did the police officer tell you you made a correct identification? A Yes, sir.

Q This made you feel good, didn't it? A Kind of.

Q Let me ask you this. Did your sister identify [93] this picture? A Yes, sir. It was this one.

Q This one she identified, and not the other one? A Yes, sir. They look alike.

Q They look alike, you say? A Yes, sir.

Q Are they the same people? Is this the same one I showed you a minute ago? A No, sir.

Q Did your sister identify this one? A Yes, sir.

Q Did you identify this one? A Yes, sir. It was that one. I thought it was that one there.

Q You thought it was the other one? A It looked just like him.

Q It looked just like him?

Mr. Campbell: I will ask Mr. McLellon to identify which picture he is talking about.

Mr. McLellon:

Q This is the picture I just showed you? A No, sir.

Q This isn't the picture I just showed you?

Mr. Campbell: Objection. I object to him yelling at this fifteen-year-old girl.

[94] The Court: I think we should have subject numbers to the pictures.

Mr. McLellon: 62005 is the one I showed.

Mr. Campbell: I'm asking which picture he showed her when. I don't know what picture he is talking about. Identify them as you show them, please.

Mr. McLellon:

Q You say these two men here look alike? A Yes, sir.

Q They do look alike? Which one did you identify? A This one.

Q You are pointing to the one with 62005 on it, is that correct? A Yes, sir.

Q When I asked you while ago did you think this was the one, I was talking about the one with 62003. Did you think he was the one being tried today? A No, sir.

Q Why did you say you identified that picture? Did you feel 62003 was involved in this? A No, sir. It looked just like the one they were showing us.

Q What do you mean "it looked like the ones [95] they were showing"? Let me ask you this. Was this man here, 62003, one of the men that looked in the window? A No, sir.

Q It was not? Want to read the name on the back of that picture? A "Steward."

Q You say Steward was not one of the men involved in this, is that correct? A I ain't saying, but I didn't see him.

Q You looked right in the faces of the men who looked in the window, correct? A One face. One turned around.

Q You looked at one face? Didn't you tell us you saw them get off a bus and come across the street? A Yes, sir, but I was in Rich's.

Q You didn't pay attention to them, did you? A I was paying some attention.

Q You are not telling the Court you saw the men out of Rich's and watched them walk down the street, are you? You were interested in your hamburgers. A No, sir. I was looking out the window.

Q You want to tell the police you watched these men particularly get off the bus, look in the window, and walk down the street to where the sailor was? Is that what you told the police? [96] A Yes, sir. I told.

Q No question this one with Steward on the back was not one of the men?

Mr. Campbell: He asked her three or four times and she never said that, and I object to him using that method on this young girl.

Mr. McLellon: I believe she has said it.

The Court: She said she saw one face that looked in Rich's. She didn't say he wasn't the other person. She said she saw one face that looked in Rich's.

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